***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

76-7436

IN THE

UNITED STATES COURT OF APPEALS

For the Second District

Docket No. 76-7436

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JOELLE FISHMAN, PETER GAGYI,
GUS HALL AND JARVIS TYNER

Plaintiffs-Appellants

P/S

vs.

GLORIA SCHAFFER, in her capacity as Secretary of the State of the State of Connecticut and EVELYN GOODWIN, in her capacity as Town Clerk of the Town of Litchfield, Connecticut

Defendants-Appellees

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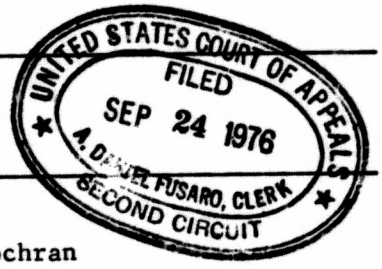
# REPLY BRIEF OF APPELLANTS




Frank Cochran
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57 Pratt St.
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Plaintiffs-Appellants Fishman, Gagyi, Hall and Tyner have filed three briefs in this court on the merits of the present appeal and have no desire to brief the issues raised in them any further. But the State raises new factual questions by attaching affidavits to its brief, in the guise of updating the court as to the underlying situation, and some responses to these, and the legal arguments it pends from them, is necessary. The State refers on page 1 to Hall and Tyner as "an evidently disqualified petitioning party", and attached to the brief is an affidavit from elections attorney Henry Cohn stating that as of Friday, September 17 only 11,685 certified signatures were in his hands, a figure more than 1550 short of the required number of signatures, but already a substantial showing of community support. The final date for submission of certified signatures by the town clerks to the Secretary of the State had not, however, passed, nor were the results of any review of rejected signatures known. Plaintiff Fishman, in her affidavit of September 2, states that about 23,000 signatures were filed with town clerks. Connecticut statutes provide no mechanism for reviewing the town clerks' rejections administratively, and the Secretary of the State's office has declined to set one up (Appellants' Sept. 21 aff.) despite past experience which clearly indicates a very substantial error rate (Hall v Schaffer Superior Court, New Haven County, October, 1972). Hall and Tyner have also submitted affidavits, copies of which are attached, suggesting that the error rate this year in the present petitions is about twenty percent (20%), or 2400 signatures erroneously rejected. Even if the errors statewide were

only one third as frequent as that, or 7%, there would be a sufficient number of them to render the 1550 unfiled signatures the balance between Hall and Tyner's success or failure in gaining access to the Connecticut ballot.

The plaintiffs will shortly seek judicial relief in the state court compelling the correction of petitions submitted by the town clerks to the Secretary of the State adding a sufficient number of certified signatures to render the unfiled 1550 signatures crucial.

In McCarthy v Guzzi (Superior Court Suffolk County, Massachusetts Nos 15860, 15861) (stay granted September 17,1976, Hale, J) the trial court accepted the plaintiff's estimate that twenty-five percent (25%) of the rejected sigantures had been erroneously rejected in determining that Eugene McCarthy had sufficient community support to be included on the Massachusetts ballot.

Indeed, the claim for declaratory relief would not be moot even if Hall and Tyner had been finally excluded from the Connecticut ballot. Mitchell v Donovan 300 FSupp 1145, remanded 398 US 427 (1970), Storer v Brown 415 US 724, 727 n8 (1974) (situation "capable of repetition, yet evading review").

Nor does the printing of overseas and absentee ballots without Hall and Tyner's names make relief impossible. It is noted here that the state chose to go ahead and print ballots despite this Court's willingness

to expedite the appeal, and that the delays which have caused whatever present difficulties there are in affording proper relief are due solely to the District Court's disposition of the matter and the state's unwillingness to afford petitioning parties a constitutional system. They are not due to inaction on the part of Hall and Tyner. Williams v Rhodes 393 US 23, 34-5. Compare with Socialist Labor Party v Rhodes 393 US 23, 34-5 (1968). The Secretary of the State should and can be ordered to print inserts or stickers and distribute them to the relevant officials now in possession of the ballots. Even if the court were unwilling to order such affirmative relief on the ground of its burdensomeness or some other ground, Hall and Tyner can easily be ordered onto the voting machines used by all other Connecticut voters. Such relief would substantially enforce their rights without the "administrative burden" or "confusion" the state finds so objectionable with regard to printing overseas and absentee ballots.

The state also argues that this court should now remand the case and require the plaintiffs to seek relief in the Supreme Court. (Appellees' Brief pp. 30-31). MTM v Baxley 420 US 799 (1975), cited by the state, also squarely holds that Section 1253 does not apply to circumstances similar to those presented here.

In explaining its decision that no direct appeal existed under Section 1253 unless a three-judge District Court had reached "the merits of

a constitutional claim for injunctive relief" 420 US at 803, the Court explained:

> It is certain that the congressional policy behind the three-judge court and direct review apparatus - the saving of state and federal statutes from improvident doom at the hands of a single judge - will not be impaired by a narrow construction of Section 1253. A broad construction of the statute, on the other hand, would be at odds with the historic congressional policy of minimizing the mandatory docket of this Court in the interest of sound judicial administration. 420 US at 804

There is no question that this court has jurisdiction over appeal from the denial of declaratory relief Mitchell v Donovan 398 US 427 (1970). By its plain wording Section 1291 applies and this court is the proper forum for this appeal. Nor is this court precluded by any statute or rule from affording Hall and Tyner the relief sought. A mandatory injunction placing Hall and Tyner on the ballot is within this court's jurisdiction and clearly in order at the present time Williams v Rhodes 393 US 23 (1968).

RESPECTFULLY SUBMITTED

By _____

Frank Cochran
Connecticut Civil Liberties
Union Foundation, Inc.
57 Pratt St.
Hartford, Ct. 06103

State of Connecticut

ss at Hartford, September 21, 1976

County of Hartford

Affidavit

I, FRANK COCHRAN, attorney for the plaintiff-appellants Joelle Fishman, Peter Gagyi, Gus Hall and Jarvis Tyner, and being first duly sworn, depose and say

1. This affidavit is being made to supplement and update the factual background to the appeal in Fishman et al v Schaffer No. 76-7436.

2. On September 20, 1976, I was notified by agents of my clients that they had been checking the signatures rejected by the Town Clerks of Hartford and New Haven from the petitions filed with those Town Clerks to put Hall and Tyner on the Connecticut ballot, and that their check had revealed that a substantial number of signatures had been rejected in error.

3. I thereupon reviewed the statutes. No administrative review of the signature checking process is provided by statutes; neither the towns nor the Secretary of the State's office, nor any other agency is required to correct mistakes.

4. I then called chief elections attorney Henry Cohn to suggest that he set up such an administrative review and stressed that substantial numbers of erroneous rejections were turning up. Mr. Cohn disclaimed any responsibility for checking or reviewing the accuracy of the towns' determinations, and declined to assist in setting up any such process.

Frank Cochran

Sworn to and subscribed before me this 21st day of September, 1976

Commissioner of the Superior Court

STATE OF CONNECTICUT

ss: AT NEW HAVEN, SEPTEMBER 22, 1976

COUNTY OF NEW HAVEN

I, MARTIN SIMON, being first duly sworn, depose and say:

1. This affidavit is being made for the purpose of updating and supplementing the factual background of the appeal in Fishman et als v. Schaffer et al, No. 76-7436.

2. For the past several days I have been engaged in checking the accuracy of the determinations made by the Registrar of Voters and Town Clerk in New Haven, Connecticut, in certifying or rejecting signatures on the petitions to put Gus Hall and Jarvis Tyner on the ballot in Connecticut as the Communist Party candidates for President and Vice President of the United States.

3. As of late on Tuesday, September 21, 1976 I had checked 74 petition sheets. There were a total of 2093 signatures on the sheets of which 809 had been certified as valid by the Registrar and Town Clerk and 1284 had been rejected. Using the 1975 perfected list and the current list, I determined that an additional 312 signatures appeared on one or the other list although they had been rejected by the Registrar and Town Clerk. For the petitions I have checked, 24 % of the signatures rejected should have been accepted.

4. I am continuing to check rejected signatures at the present time.

Martin Simon
MARTIN SIMON

Sworn to and subscribed before me ~~this~~ the 22nd day of September, 1976.

~~Commissioner of Superior~~ Court

CERTIFICATE OF SERVICE

This is to certify that on the ~~21st~~ 22d day of September, 1976, copies of the foregoing were mailed, postage prepaid to Daniel Schaefer, Esq., Assistant Attorney General, 30 Trinity Street, Hartford, Connecticut, counsel for Appellee Gloria Schaffer, David Losee, Esq., Connolly, Holtman and Losee, 4 North Main Street, West Hartford, Connecticut, counsel for Appellee Evelyn Goodwin, and John Armor, Esq., Armor and Marcus, P.A., 425 The Rotunda, 711 West 40th Street, Baltimore, Maryland, counsel for Eugene McCarthy.

FRANK COCHRAN